

2011

Misreading PADCO: How a Pernicious Error is Contaminating Minnesota's Law of Fiduciary Duty

Christoper Moseng

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Moseng, Christoper (2011) "Misreading PADCO: How a Pernicious Error is Contaminating Minnesota's Law of Fiduciary Duty," *William Mitchell Law Review*: Vol. 37: Iss. 2, Article 4.
Available at: <http://open.mitchellhamline.edu/wmlr/vol37/iss2/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

MISREADING *PADCO*: HOW A PERNICIOUS ERROR IS CONTAMINATING MINNESOTA’S LAW OF FIDUCIARY DUTY

Christopher Moseng[†]

I. INTRODUCTION.....	971
II. COURTS AND LITIGANTS ERRONEOUSLY RELY ON <i>PADCO</i> WHEN DISCUSSING THE ESSENTIAL ELEMENTS OF A FIDUCIARY DUTY CLAIM	973
III. WHAT <i>PADCO</i> DOES AND DOES NOT SAY ABOUT FIDUCIARY DUTY CAUSES OF ACTION	975
IV. THE ESSENTIAL ELEMENTS OF A BREACH OF FIDUCIARY DUTY CLAIM IN MINNESOTA ARE DUTY AND BREACH.....	981

I. INTRODUCTION

In a succinct 1989 opinion, the Minnesota Court of Appeals decided *Padco, Inc. v. Kinney & Lange*, addressing claims for legal malpractice and breach of fiduciary duty.¹ In the years since, *Padco* has been cited several times for its treatment of the fiduciary duty claim. Indeed, it has become a leading case for the Minnesota Court of Appeals when discussing the essential elements of a breach of fiduciary duty claim.² Practitioners, state and federal

[†] The author earned his J.D. with distinction from the University of Iowa College of Law in 2008, where he was a member of the Pro Bono Society and a Managing Editor of the *Journal of Gender, Race & Justice*. He formerly clerked for Judge Kevin G. Ross at the Minnesota Court of Appeals, and for Judge Charles A. Porter, Jr., in Minnesota’s Fourth Judicial District. He is currently an associate at A•S•K Financial in Eagan, Minnesota. As a former court of appeals clerk, the author has deep respect and admiration for the hardworking judges, clerks, and staff of the Minnesota Court of Appeals. The author thanks his wife Virginia and former appellate co-clerk Kristopher (Tip) Lee for their editorial input.

1. 444 N.W.2d 889 (Minn. Ct. App. 1989).

2. On April 26, 2010, a search of Westlaw’s Minnesota statewide cases database for “‘fiduciary duty’ /s element!” returned twenty-one results. Seventeen

district courts, and the Minnesota Court of Appeals have all relied upon *Padco* for what it purportedly states about the elements of a breach of fiduciary duty claim.³ But careful scrutiny of *Padco* itself and of other statements of Minnesota's fiduciary duty law reveal that *Padco* does not say what has been repeatedly attributed to it.

Padco is often cited to support the proposition that the essential elements for a breach of fiduciary duty claim are the same as the essential elements for a claim of negligence.⁴ But *Padco* does not hold or stand for that proposition—the *Padco* court itself recognized otherwise.⁵ The purpose of this article is to identify and highlight the error with the hope that it will not be perpetuated to the detriment of future claimants as well as to formulate a more accurate statement of the essential elements of a fiduciary duty claim under Minnesota law.

were opinions released after *Padco*. Five of those cite *Padco*, and a sixth cites a federal district court case that relies on *Padco*. See *Rucki v. Grazzini*, Nos. A09-0694, A09-0700, A09-1693, 2010 WL 1286725, at *5 (Minn. Ct. App. Apr. 6, 2010) (citing *Padco*, 444 N.W.2d at 891, for the proposition that “the elements of a breach-of-fiduciary-duty claim are the same as those of negligence.”); *Mesenbrink v. Riverwood ENT, LLC*, No. A09-334, 2009 WL 3818378, at *3 (Minn. Ct. App. Nov. 17, 2009) (citing *Padco*, 444 N.W.2d at 891, for the proposition that a negligence claim has the same elements as a breach of fiduciary duty claim); *Tyler Holdings, Inc. v. JJT, LLC*, No. A07-2046, 2008 WL 5136443, at *8 (Minn. Ct. App. Dec. 9, 2008) (citing *Padco*, 444 N.W.2d at 891, for the idea that a negligence claim has the same elements as a breach of fiduciary duty claim); *Azbill v. Grande*, No. A04-2139, 2005 WL 1331718, at *8 (Minn. Ct. App. Aug. 16, 2005) (citing *Padco*, 444 N.W.2d at 891, for the idea that a negligence claim has the same elements as a breach of fiduciary duty claim); *Tisdell v. ValAdCo*, Nos. C0-01-2054, C6-01-2060, C2-01-2055, C6-01-2057, 2002 WL 31368336, at *13 (Minn. Ct. App. Oct. 16, 2002) (citing *Conwed Corp. v. Emp'r Reinsurance Corp.*, 816 F. Supp. 1360, 1362 n.3 (D. Minn. 1993), which relies on *Padco* for the proposition that causation is a required element for a breach of fiduciary duty claim); *Star Centers, Inc. v. Faegre & Benson, LLP*, No. C0-00-2075, 2001 WL 605088, at *3 (Minn. Ct. App. June 5, 2001) (citing *Padco*, 444 N.W.2d at 891, for the proposition that the elements of a breach of fiduciary claim are the same as those of a negligence claim). Each of these is an unpublished Minnesota Court of Appeals decision, and all reason (expressly or implicitly) that *Padco* describes the necessary elements of a claim for breach of fiduciary duty.

3. See, e.g., cases cited *supra* note 2; *Conwed*, 816 F. Supp. at 1362 n.3 (citing *Padco*, 444 N.W.2d at 891 for the proposition that the elements required for a breach of fiduciary duty claim are the same as those for a negligence claim); see also *infra* notes 8, 61.

4. See, e.g., cases cited *supra* note 2 and *infra* note 61.

5. See *infra* Part III (arguing that *Padco* did not hold that the elements of both negligence and breach of fiduciary duty are the same and explaining the confusion).

II. COURTS AND LITIGANTS ERRONEOUSLY RELY ON *PADCO* WHEN DISCUSSING THE ESSENTIAL ELEMENTS OF A FIDUCIARY DUTY CLAIM

A string of unpublished court of appeals decisions cited *Padco* for the proposition that “[u]nder Minnesota law, the elements required to state a breach-of-fiduciary-duty claim are the same as those required to establish a negligence claim.”⁶ These cases reached this conclusion by relying exclusively on an inference drawn from *Padco* without any further discussion or analysis.⁷ In one instance, the errant conclusion was reimported by the court of appeals from a published federal case which drew the same inference from *Padco* in the same manner.⁸ Federal and state trial courts have been persuaded to draw the same flawed inference.⁹

Concededly, the mistake is not without a certain intellectual appeal. The notion that a legal cause of action requires, as a threshold for sufficiency, an allegation of harm to the plaintiff caused by the defendant is a familiar aspect of the law of negligence.¹⁰ It seems to follow naturally to a judicious mind that if a plaintiff did not suffer pecuniary or personal harm as a consequence of a defendant’s acts, then why should the judicial system be involved at all? The rationale’s appeal is magnified by the easy parallels between a fiduciary duty claim and a negligence

6. *Star Centers*, 2001 WL 605088, at *3; see also cases cited *supra* note 2.

7. See cases cited *supra* note 2; see also THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2, at 54 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010) (providing that the use of “*see*” citations is used when an authority does not directly support a proposition, but supports the proposition by inference).

8. *Tisdell v. ValAdCo*, Nos. C0-01-2054, C6-01-2060, C2-01-2055, C6-01-2057, 2002 WL 31368336, at *13 (Minn. Ct. App. Oct. 16, 2002) (citing *Conwed Corp. v. Emp’r Reinsurance Corp.*, 816 F. Supp. 1360, 1362 n.3 (D. Minn. 1993), a federal case that relies exclusively on an inference ostensibly supported by *Padco* to draw the same conclusion).

9. See, e.g., *Conwed*, 816 F. Supp. at 1362 n.3; Findings of Fact, Conclusions of Law, and Order for Judgment at 20, *Swenson v. Bender*, No. 02-C9-06-007901 (Minn. 10th D. Feb. 22, 2008), as reprinted in Appellant’s Brief Appendix at 45, *Swenson v. Bender*, 764 N.W.2d 596 (Minn. Ct. App. 2009). But see Order, *Carlson v. Lindquist & Vennum*, No. 27-CV-09-20302 (Minn. 4th D. Apr. 6, 2010) (rejecting the argument that causation or harm are essential elements of a fiduciary duty claim).

10. *State Farm Fire & Cas. v. Aquila, Inc.*, 718 N.W.2d 879, 887 (Minn. 2006) (stating elements of negligence claim); *Herrmann v. McMenemy & Severson*, 583 N.W.2d 283, 290 n.8 (Minn. Ct. App. 1998) (noting that Minnesota recognizes the common law rule that injury is an essential element of negligence, and impliedly recognizing the availability of nominal damages for other claims), *rev’d on other grounds*, *Herrmann v. McMenemy & Severson*, 590 N.W.2d 641 (Minn. 1999).

claim: both unmistakably require a claimant to allege duty and breach.¹¹

As it turns out, states are divided on the proper treatment of breach of fiduciary duty causes of action. Some states unequivocally perceive the claim in the negligence tort vein and require proof of harm and causation.¹² But other states conclude that breaches of fiduciary duty are inherently harmful and do not require plaintiffs to prove harm in order to make a recovery.¹³ In Minnesota, breach of a fiduciary duty is not a form of negligence, but a distinct cause of action that sounds in equity.¹⁴

Because the claim sounds in equity, fiduciary beneficiaries may pursue a broader range of remedies than may be available to a negligence claimant. A beneficiary may be “entitled to tort damages for harm caused by the breach of duty arising from [a fiduciary] relation” in accordance with the ordinary tort damages rules.¹⁵ But

[i]n addition to or in substitution for [tort] damages the beneficiary may be entitled to restitutionary recovery, since not only is he entitled to recover for any harm done to his legally protected interests . . . , but ordinarily he is entitled to profits

11. See *Aquila*, 718 N.W.2d at 887 (stating elements of negligence claim). But see *Swenson*, 764 N.W.2d at 603–04 (explaining the court’s reluctance to substitute breach of fiduciary duty claims for breach of duty under tort claims).

12. E.g., *Gracey v. Eaker*, 837 So.2d 348, 353 (Fla. 2002) (requiring proximate causation as an element of breach of fiduciary duty), cited in Thomas L. Hafemeister & Richard M. Gulbrandsen, *The Fiduciary Obligation of Physicians to “Just Say No” if an “Informed” Patient Demands Services That are Not Medically Indicated*, 39 SETON HALL L. REV. 335, 375 n.198 (2009); *Miller v. Keybank Nat’l Ass’n*, No. 86327, 2006 WL 871621, at *5 (Ohio Ct. App. Apr. 6, 2006) (requiring proximate causation of injury as an element for breach of fiduciary duty); *Longaker v. Evans*, 32 S.W.3d 725 (Tex. Ct. App. 2000) (en banc) (requiring proof of damage as an element for breach of fiduciary duty).

13. Thomas L. Hafemeister & Sarah P. Bryan, *Beware Those Bearing Gifts: Physicians’ Fiduciary Duty to Avoid Pharmaceutical Marketing*, 57 U. KAN. L. REV. 491, 524 n.195 (2009) (citing *Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 543 (2d Cir. 1994); *Zackiva Commc’ns Corp. v. Horowitz*, 826 F. Supp. 86, 88 (S.D.N.Y. 1993); *Rice v. Perl*, 320 N.W.2d 407, 411 (Minn. 1982); *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969)).

14. *Swenson*, 764 N.W.2d at 603–04; *Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 778 (Minn. Ct. App. 2006); see RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (1979) (“The remedy of a beneficiary against a defaulting or negligent trustee is ordinarily in equity”); see also Hafemeister & Bryan, *supra* note 13, at 524 n.195 (citing *Rice*, 320 N.W.2d at 411 as an example of a decision that causation of harm is not a necessary element of fiduciary duty claims).

15. RESTATEMENT (SECOND) OF TORTS § 874 cmt. b (1979).

that result to the fiduciary from his breach of duty¹⁶
 The right of a fiduciary breach claimant to compel disgorgement or other noncompensatory remedies irrespective of actual harm caused to the claimant by a defendant is well established common law.¹⁷ Indeed, these remedies are not only well established common law, but they are specifically recognized in Minnesota.¹⁸

III. WHAT *PADCO* DOES AND DOES NOT SAY ABOUT FIDUCIARY DUTY CAUSES OF ACTION

Hennepin County District Court Judge Beryl Nord granted summary judgment to defendant David Fairbairn and his law firm on November 10, 1988, putting to rest claims related to legal work they had done for plaintiff Padco, Inc. in the early 1980s.¹⁹ Judge Nord's summary judgment decision was affirmed by the court of appeals, and ultimately, the Minnesota Supreme Court denied Padco's petition for further review.²⁰ Padco's chief complaint was that the Kinney & Lange law firm, which represented Padco in a federal patent lawsuit, hired two attorneys who had worked for a firm that had represented the adverse party in the patent litigation.²¹ Kinney & Lange's hiring decision led a federal judge to disqualify Kinney & Lange from further representing Padco in the patent litigation.²²

In its summary judgment decision, the district court considered and decided a claim for breach of fiduciary duty.²³ The court recognized the fiduciary duty claim even though it had not

16. *Id.*

17. *See generally* RESTATEMENT (FIRST) OF RESTITUTION §§ 190–201 (1937) (detailing a series of restitutionary remedies available to the beneficiary that do not require as a prerequisite harm caused by a fiduciary breach); RESTATEMENT (SECOND) OF TORTS § 874 (1979) (explaining, in general, the concepts of fiduciary duty, breach, and liability); RESTATEMENT (SECOND) OF AGENCY §§ 399–404A (1958) (describing forms of liability that may arise against an agent that breaches a fiduciary duty).

18. *See, e.g.,* *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 212–13 (Minn. 1984); *Commercial Assocs.*, 712 N.W.2d at 778–82; *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. Ct. App. 1989).

19. Order & Memorandum, *Padco, Inc. v. Kinney & Lange*, No. CT 86-11447 (Minn. 4th D. Nov. 10, 1988).

20. *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889 (Minn. Ct. App. 1985), *review denied*, Nov. 15, 1989.

21. Order & Memorandum, *supra* note 19, at 1.

22. *Id.*

23. *Id.* at 5–6.

been expressly identified in the complaint.²⁴ The district court concluded that the claim had been sufficiently pled, but ultimately determined that the plaintiff had not provided evidence that the defendants had breached a fiduciary duty.²⁵

The district court's decision to recognize the claim was not expressly supported by legal citation, but the court was satisfied that the plaintiff had adequate notice of the claim by virtue of the complaint's expressly stated claim for professional negligence.²⁶ The court reasoned that the claim for attorney malpractice incorporated an implicit claim for breach of fiduciary duty, stating: "An essential element of any negligence claim is that plaintiff must prove that defendant owes him a duty. It is axiomatic that in an attorney malpractice case the duty required is that of a fiduciary nature."²⁷ The court concluded that the claim was sufficiently pled on that basis, and proceeded to evaluate whether the plaintiff's evidence could support the conclusion that the defendants breached the duty owed to Padco.²⁸ Determining that Padco's evidence was not sufficient on the element of breach, the district court granted summary judgment.²⁹

Padco appealed.³⁰ Its brief on appeal contained extensive argument concerning Minnesota's law of fiduciary duty.³¹ Padco argued that "Minnesota courts conclusively hold that attorneys who breach their fiduciary duty to clients forfeit the right to compensation" and that "if the attorney breaches his or her fiduciary duty to the client, 'the client is deemed injured even if no actual loss results.'"³² Padco argued thoroughly that a claimant who had suffered harm from a fiduciary's breach did not need to prove damages, citing three Minnesota Supreme Court decisions in support of its argument: *Gilchrist v. Perl*, 387 N.W.2d 412 (Minn. 1986), *Perl v. St. Paul Fire & Marine Insurance Co.*, 345 N.W.2d 209 (Minn. 1984), and *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982).³³

24. *Id.* at 5.

25. *Id.* at 6.

26. *Id.* at 5.

27. *Id.*

28. *Id.* at 5–6.

29. *Id.* at 6.

30. *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889 (Minn. Ct. App. 1989).

31. Brief of Appellant at 10–12, *Padco*, 444 N.W.2d 889 (Minn. Ct. App. 1989) (No. CT 86-11447).

32. *Id.* at 10 (quoting *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 212 (Minn. 1984)).

33. *Id.* at 11–12.

Kinney & Lange and David Fairbairn (respondents in the court of appeals) rejoined, unsurprisingly, that the district court's summary judgment decision was correct.³⁴ They contended that Padco "had failed to show any genuine issue of material fact" on its breach of fiduciary duty claim, and that the three *Perl* cases did not apply.³⁵ Importantly, for purposes of this article, the respondents made an additional argument in a footnote.³⁶ Though there is no reason to believe that the respondents could have anticipated its effect, this surplus argument is the source of an error courts and practitioners in Minnesota have been repeating for years. The footnote reads as follows:

This theory was never alleged in plaintiff's Complaint; the claim was asserted in this litigation for the first time at the time of the summary judgment motions, over two years after the action was commenced. Plaintiff's Complaint only contains counts for professional negligence (Count I), breach of contract (Count II), and punitive damages (Count III). Having been unable to produce any evidence to establish proximate cause or damages, plaintiff's attempt to seek recovery on a theory not alleged in its Complaint was untimely, and should not have been considered. Obviously, however, the trial court's error in considering the untimely breach of fiduciary duty claim was harmless in light of its decision on the merits.³⁷

The court of appeals identified two issues in the appeal: whether the district court correctly granted summary judgment on (1) Padco's legal malpractice claims and (2) Padco's breach of fiduciary duty claims.³⁸ To begin its discussion of the fiduciary duty issue, the court noted that "[t]he parties disagree on whether the complaint includes a claim for breach of fiduciary duty."³⁹ The court then addressed the respondents' footnoted argument that the claim was not adequately pled.⁴⁰ The court of appeals resolved the issue in a single paragraph, but with language that has proved fertile material for misinterpretation. The court wrote:

34. Brief of Respondent at 14, *Padco*, 444 N.W. 889 (No. CT 86-11447).

35. *Id.* at 15.

36. *Id.* at 14 n.3.

37. *Id.*

38. *Padco*, 444 N.W.2d at 890.

39. *Id.* at 891.

40. *Id.*

The complaint contains three counts, separately labeled as “Professional Negligence,” “Breach of Contract,” and “Punitive Damages.” The negligence count alleges the same elements which would be required for a claim of breach of fiduciary duty. A specific legal theory does not need to be stated if the pleadings contain factual notice of the claim and a request for relief. Under these circumstances, the complaint sufficiently alleges a claim for breach of fiduciary duty.⁴¹

With that paragraph, the court of appeals held that Padco’s complaint sufficiently pled a breach of fiduciary duty claim, even though no such claim was expressly identified in the complaint.⁴² The analysis and conclusion more or less reiterated the district court’s determination, adding supporting legal authority for the proposition that claims may be included in a complaint despite not being expressly identified.⁴³ In the remainder of the opinion, the court proceeded to address the substance of the claim, and concluded by determining that Padco failed to allege any fact that would constitute a breach.⁴⁴

One sentence in that paragraph has inspired the pernicious error at this article’s focus. The court’s statement that “[t]he negligence count alleges the same elements which would be required for a claim of breach of fiduciary duty”⁴⁵ is the culprit—a source of confusion that has confounded litigants and courts in the years since *Padco* was decided.

To illustrate that *Padco* has been misunderstood, and that it did not state or imply that negligence and fiduciary duty claims have the same elements, it is useful to highlight what else the case said and did not say about claims for breach of fiduciary duty. The *Padco* court unequivocally acknowledged the Minnesota Supreme Court precedents cited in the appellant’s brief.⁴⁶ The court of appeals wrote that under Minnesota law,

41. *Id.* (citations omitted).

42. *See id.*

43. *Compare id.*, with Order and Memorandum, *supra* note 19, at 5.

44. *Padco*, 444 N.W.2d at 891–92. This constituted a near-agreement with the district court, which determined that Padco *failed to provide evidence* to support a finding of breach. *See* Order and Memorandum, *supra* note 19, at 6.

45. *Padco*, 444 N.W.2d at 891.

46. *See id.*

[o]nce an attorney's breach of fiduciary duty is established, the attorney clearly forfeits his right to compensation for his services if the case involves actual fraud or bad faith. In cases where there is no actual fraud or bad faith, *where there is no actual harm to the client*, and where the breach involves "multiple potential plaintiffs," the fee forfeiture may be scaled to the degree of misconduct by consideration of the factors enumerated in the punitive damages statute, Minn. Stat. § 549.20, subd. 3 (1988).⁴⁷

The *Padco* court therefore recognized that a party may recover for a breach of fiduciary duty that did not cause harm, and impliedly recognized that the only *essential* elements of a claim are duty and breach.

Padco should also be recognized for what it did not say: the opinion failed to decide the fiduciary duty issue by concluding *Padco* provided no evidence that the alleged breach caused harm.⁴⁸ The court's analysis was divided into two numbered sections: section I, addressing *Padco*'s claim for professional negligence, and section II, dealing with the claim for breach of fiduciary duty.⁴⁹ Section I concluded when the court affirmed the district court's grant of summary judgment on the negligence claim, on the basis that *Padco* failed to prove that the defendants' negligence proximately caused damage.⁵⁰ The court had a clear opportunity to decide the fiduciary duty issue on the same basis and conclude the opinion without further discussion.⁵¹ The omission makes perfect sense in light of the court's recognition that a plaintiff with a fiduciary duty claim can recover even "where there is no actual harm." Having correctly recognized that Minnesota law does not require causation of damages as a necessary element in a claim for breach of fiduciary duty, the court addressed the fiduciary duty issue separately.

47. *Padco*, 444 N.W.2d at 891 (emphasis added) (citing for support *Gilchrist v. Perl*, 387 N.W.2d 412, 417 (Minn. 1986)).

48. *See id.* at 891–92.

49. *Id.* at 890–91.

50. *Id.* at 891.

51. *Padco*'s fiduciary duty claim was premised entirely on the facts it alleged to establish its claim for negligence. *Id.*; Order & Memorandum, *supra* note 19, at 5. Assuming arguendo that a breach of fiduciary duty claim has the same essential elements as a negligence claim, then the fate of the fiduciary duty claim should have been determined by the same lack of damages evidence that defeated *Padco*'s negligence claim.

As is hopefully clear at this point, the court of appeals was not directly asked in *Padco* to decide the essential elements of a claim for breach of fiduciary duty. And in no way do the analysis or conclusions in *Padco* support a conclusion that the essential elements of negligence and breach of fiduciary duty are the same. The *Padco* court was asked to decide whether a plaintiff's claim had sufficiently stated a cause of action, which the court decided in the affirmative by concluding that the facts alleged in the complaint were sufficient to sustain the claim. In doing so, it stated that "[t]he negligence count alleges the same elements which would be required for a claim of breach of fiduciary duty."⁵² That is, in the complaint filed by Padco, the count identified as a negligence count specifically alleged facts sufficient to sustain a claim for fiduciary duty. The court of appeals was not making a statement about negligence claims, generally; it was making a statement about the specific negligence count (and the facts incorporated therein) in Padco's complaint. Nor was the court of appeals making a statement of law about the elements of fiduciary duty breach claims, except to say that whatever the essential elements are, they were present in Padco's complaint.

Put another way, it would be correct to infer from *Padco* that a claim for professional negligence against an attorney necessarily includes a distinct claim for breach of fiduciary duty—the allegations necessary to state the first claim will generally include allegations sufficient to sustain the second.⁵³ But it is invalid to conclude based on *Padco* that the cause of action known as breach of fiduciary duty and the cause of action for negligence bear identical essential elements. Not only does *Padco* not say such a thing—it recognized the contrary! The *Padco* court recognized that a claim for breach of fiduciary duty could be sustained even in the absence of harm to the plaintiff.⁵⁴ The court's troublesome statement that Padco's "negligence count alleges the same elements" means only that the factual allegations necessary to sustain a fiduciary duty claim were a subset of the facts Padco

52. *Padco*, 444 N.W.2d at 891.

53. Or, as the district court's summary judgment decision in *Padco* more eloquently explained, "[a]n essential element of any negligence claim is that plaintiff must prove that defendant owes him a duty. It is axiomatic that in an attorney malpractice case the duty required is that of a fiduciary nature." Order and Memorandum, *supra* note 19, at 5.

54. *Padco*, 444 N.W.2d at 891.

alleged to support its professional negligence claim.⁵⁵

IV. THE ESSENTIAL ELEMENTS OF A BREACH OF FIDUCIARY DUTY CLAIM IN MINNESOTA ARE DUTY AND BREACH

As explained above, harm caused by a defendant is not a necessary element of a breach of fiduciary duty claim.⁵⁶ If a claimant establishes the existence of a fiduciary relationship and the breach of a duty arising from that relationship, then harm is implied by the breaching party's violation of trust and loyalty.⁵⁷ Consequently, there are only two essential elements of a claim for breach of fiduciary duty in Minnesota: duty and breach.⁵⁸

Fiduciary duties arise when two parties are in a fiduciary relationship.⁵⁹ Once a fiduciary relationship is established, a variety of fiduciary duties arise, generally including duties of loyalty and fidelity.⁶⁰ It may be that a party seeking *only* to recover compensatory damages from a wayward fiduciary may need to establish that a breach caused the damages.⁶¹ But because compensation is not the only viable theory of recovery for a fiduciary duty claim, and because a party may recover without having been harmed at all,⁶² neither damages nor causation of

55. *Id.* The beginning of the troublesome sentence would be more accurately phrased as “[Plaintiff’s] negligence count alleges . . .” than its current form.

56. *Commercial Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, at 778 (Minn. Ct. App. 2006) (citing *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209 (Minn. 1984)); *see also* *Hafemeister & Bryan*, *supra* note 13, at 524 n.195 (2009).

57. *See St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d at 212–13.

58. *See id.*; *see also* *Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. Ct. App. 2009).

59. *Swenson*, 764 N.W.2d at 601 (“Fiduciary relationships arise when one person trusts and confides in another who has superior knowledge and authority.”) (citing *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 330 (Minn. Ct. App. 2007). “A ‘fiduciary’ is ‘[a] person who is required to act for the benefit of another person on all matters within the scope of their relationship.’” *Id.* (citing BLACK’S LAW DICTIONARY 658 (8th ed. 2004)).

60. *Id.*; *Commercial Assocs.*, 712 N.W.2d at 779.

61. *See Herrmann v. McMenemy & Severson*, 583 N.W.2d 283, 287–88, 288 n.5 (Minn. Ct. App. 1998) (discussing a professional negligence claim), *rev’d on other grounds*, 590 N.W.2d 641 (Minn. 1999). *Herrmann* is another decision by the Minnesota Court of Appeals with language that could be construed to conflate causes of action premised on negligence and fiduciary duty.

62. *See St. Paul Fire & Marine*, 345 N.W.2d at 212 (providing that disgorgement is available in lieu of nominal damages); *Commercial Assocs.*, 712 N.W.2d at 778 (recognizing same).

damages are essential elements of a breach of fiduciary duty claim.⁶³

It is significant that the court of appeals cases construing *Padco* to stand for the contrary proposition are unpublished; the errant construction of the case has not become binding precedent.⁶⁴ No published court of appeals opinion has yet embraced the same reasoning, and the binding case law on the issue unequivocally refutes the notion that the elements of fiduciary duty and negligence claims are identical.⁶⁵ But the persuasive nature of this series of unpublished court of appeals opinions has undoubtedly affected claimants at the trial and appellate levels in the state of Minnesota, and possibly more often and more significantly than on occasions identified in this article. Despite the established case law set forth in the Minnesota Supreme Court's *Perl*⁶⁶ cases, and discussed in great length in court of appeals cases like *Commercial Associates*,⁶⁷ the misapplication of *Padco* continues to recur.⁶⁸ It may take an express, published disapproval released by one of Minnesota's appellate courts to extinguish the error once and for all. It seems almost inevitable that the court of appeals will again be invited by a party resisting a fiduciary breach claim to misconstrue *Padco*, and on that occasion, the court can right the course of Minnesota's fiduciary duty law by expressly declining the invitation.

63. The fiduciary duty cause of action is not unique for its lack of harm and causation elements. Damage is not a necessary element for a cause of action that supports an award of nominal damages, like trespass. See *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 550 (Minn. Ct. App. 2003) (noting that a cause of action for trespass requires only two elements: possession and unlawful entry); *Lake Mille Lacs Inv., Inc. v. Payne*, 401 N.W.2d 387, 391 (Minn. Ct. App. 1987) (stating that a party having established a trespass is entitled to nominal damages). The trespass action may provide a closer analogy for the elements of a fiduciary duty claim than the negligence action—both require two elements, if the elements are proven, harm is implied, and proof of compensable damages is optional rather than necessary.

64. See MINN. STAT. § 480A.08, subdiv. 3(a–c) (2008).

65. *Commercial Assocs.*, 712 N.W.2d at 778 (citing *St. Paul Fire & Marine*, 345 N.W.2d 209).

66. *Gilchrist v. Perl*, 387 N.W.2d 412 (Minn. 1986); *Rice v. Perl*, 320 N.W.2d 407 (Minn. 1982); *St. Paul Fire & Marine*, 345 N.W.2d 209.

67. *Commercial Assocs.*, 712 N.W.2d at 778.

68. See, e.g., cases cited *supra* note 2; *c.f.* Defendant's Letter Requesting Reconsideration from Terrance Flemming to Judge Porter, *Carlson v. Lindquist & Vennum*, No. 27-CV-09-20302 (Minn. 4th D. Apr. 6, 2010) (citing unpublished court of appeals opinions that rely on *Padco* for the proposition that negligence and fiduciary duty claims have the same elements) (on file with author).